

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN WILTON M.D.

*Plaintiff,*

vs.

OPHTHALMOLOGY PHYSICIANS  
AND SURGEONS, P.C., et al.

*Defendants.*

NO. 16-03784-MMB

CIVIL ACTION

**MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE PURSUANT TO  
FED.R.CIV.P. 41(a)(2)**

Plaintiff hereby moves this Court to voluntarily dismiss this action as to all Defendants pursuant to Fed.R.Civ.P. 41(a)(2) for purposes of transferring this action to the Court of Common Pleas of Montgomery County, Pennsylvania for further such proceedings to be held in that Court in accordance with 42 Pa.C.S.A. §5103. Plaintiff relies upon the attached brief in support of her motion.

Respectfully submitted,

KOLMAN ELY, P.C.

/s/ W. Charles Sipio  
Timothy M. Kolman, Esquire  
Wayne A. Ely, Esquire  
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414 Hulmeville Avenue  
Penn del, PA 19047  
(T) 215-750-3134 / (F) 215-750-3138

*Attorneys for Plaintiff*

Dated: December 1, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record via this Court's CM/ECF system.

/s/ W. Charles Sipio  
W. Charles Sipio, Esquire

Dated: December 1, 2016

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*Plaintiff,*

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NO. 16-03784-MMB

CIVIL ACTION

**BRIEF IN SUPPORT OF MOTION FOR VOLUNTARY DISMISSAL WITHOUT  
PREJUDICE PURSUANT TO FED.R.CIV.P. 41(a)(2)**

Plaintiff hereby submits the following Brief in Support of her Motion for Voluntary Dismissal Without Prejudice Pursuant to Fed.R.Civ.P. 41(a)(2):

**I. INTRODUCTION**

Plaintiff commenced this action by way of a Complaint against Defendants on July 12, 2016 (ECF Doc. 1). All Defendants filed motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) (ECF Doc. 16 and 17). This Court granted Defendant Ophthalmology Physicians and Surgeons, P.C.'s ("OPS") motion on November 15, 2016 (ECF Doc. 30). Wade, Goldstein, Landau Abruzzo P.C.'s motion was denied as moot. *Id.* In light of the Court's ruling, Plaintiff desires to transfer this action to the Court of Common Pleas of Montgomery County, Pennsylvania in accordance with 42 Pa.C.S.A. §5103. The parties have substantially agreed on transferring this action. However, OPS refuses to stipulate to the transfer of this action unless Plaintiff agrees to dismiss her FLSA claim *with prejudice*, something she is not required to do under the Federal

Rules of Civil Procedure. A dismissal of Plaintiff's FLSA claim with prejudice could operate as an adjudication on the merits that could have a collateral effect in subsequent proceedings.

For these reasons, while Plaintiff has the right to voluntarily dismiss this action in accordance with Fed.R.Civ.P. 41(a)(1)(A)(i) without a court order, she respectfully seeks an Order dismissing this action on terms that she submits are proper under the circumstances.

## II. ARGUMENT

Fed.R.Civ.P. 41(a)(1)(A)(i) permits a plaintiff to dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. Unless otherwise stated, such a dismissal is without prejudice. Fed.R.Civ.P. 41(a)(1)(B). While that provision of Rule 41 is fairly clear, its intersection with state law is somewhat vague. *See generally Williams v. F.L. Smithe Machine Co.*, 577 A.2d 907, 909 (Pa. Super. 1990); *Kelly v. Hazleton General Hospital*, 837 A.2d 490 (Pa. Super. 2003). Under Pennsylvania law, a matter filed erroneously may be transferred from a federal court by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of the Commonwealth.<sup>1</sup> 42 Pa.C.S.A. §5103(b)(2). Once the pleadings are filed they "shall have the same effect as under the practice in the United States court..." *Id.*

From a practical standpoint, Plaintiff has already filed a Complaint and Certificate of Merit in this Court (ECF Doc. 1 and ECF Doc. 28). Out of an abundance of caution and to avoid any argument that Plaintiff has somehow not complied with applicable filing deadlines under Pennsylvania law or the Pennsylvania Rules of Civil Procedure, Plaintiff respectfully submits

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<sup>1</sup> The statute states that "Except as otherwise prescribed by general rules, or by order of the United States court..." 42 Pa.C.S.A. §5103(b)(2). In that respect, this Court may enter an Order simply directly that the Clerk of Court transfer this matter to the Court of Common Pleas of Montgomery County, Pennsylvania.

that an Order directing that this action be transferred to the Court of Common Pleas of Montgomery County is the most efficient way to move this case forward without prejudice to her rights. This Court has the authority to dismiss an action on terms it considers proper pursuant to Fed.R.Civ.P. 41(a)(2). Plaintiff respectfully submits that the terms in the proposed order are proper and consistent with the obligation of the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. *See* Fed.R.Civ.P. 1.

**III. CONCLUSION**

For the reasons set forth above, Plaintiff's motion should be granted.

Respectfully submitted,

KOLMAN ELY, P.C.

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*Attorneys for Plaintiff*

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/s/ W. Charles Sipio  
W. Charles Sipio, Esquire

Dated: December 1, 2016